IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 328 OF 2002

Mahesh @ Maya @ Munna
Simon Makwana @ Vankar
Age 28 years, Indian Inhabitant
residing at A/4 Karna Building,
Majetia Park, Gala Nagar,
Nalasopara (E), Dist. Thane ...Appellant

Versus

The State of Maharashtra
(at the instance of Sion
Police Station in C.R.
No. 308 of 2000) ...Respondent

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Ms. Anjali Patil, Advocate for Appellant

Mr. D.P. Adsule, A.P.P. for State.

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CORAM: SMT. V.K. TAHILRAMANI, J.
DATED: 5TH JULY, 2005

ORAL JUDGMENT:-

1. Through this appeal, the appellant i.e. original accused No.1 has challenged the judgment and order dated 21.1.2002 passed by the Special Court Greater Bombay under the MCOC Act. By the said judgment and order, the learned Sessions Judge convicted and sentenced the appellant under Section 120-B, 144, 308 and 395 of I.P.C. Under Section 120-B, the appellant was sentenced to R.I. for three months, under Section 144 of I.P.C. the appellant was sentenced to R.I. for two years, under Section 308 of I.P.C. the appellant was sentenced to R.I. for seven years and also to pay fine of Rs.100/- i/d R.I. for ten days

and under Section 395 of I.P.C. the appellant was sentenced R.I. for seven years and also to pay fine of Rs.1000/- i/d R.I. for one month. The learned Sessions Judge directed that all substantive sentences shall run concurrently.

2. The prosecution case briefly stated is as under:-

. P.W.4 Balwant Doshi was in the construction business. At the relevant time some construction work at Malad was going on. At that time, this witness received telephone call from a person by name Mahesh Makwana. These calls were threatening in nature. The said person demanded money from this witness. The money was being demanded because this witness was carrying on construction work. On 15.11.2000 at about 2.30 a.m. he again received threatening call from Mahesh Makwana. Mahesh Makwana threatened that Rs.5.00 lakhs should be paid within five days otherwise he would not allow Balwant Doshi to do the construction work. Balwant Doshi informed him that it was not possible to pay such amount and he would not pay the amount.

. On 21.11.2000 Balwant Doshi was in his office. In the afternoon, at about 4.00 p.m. five persons suddenly entered into his cabin. Three persons remained in the cabin. One of them told Balwant

Doshi that he was Mahesh Makwana and he wanted Rs.5.00 lakhs. Balwant Doshi told him that all his construction activities were stopped and that he was unable to pay the said amount. All these three persons were having revolvers. The person who disclosed himself to be Mahesh Makwana fired a shot on Balwant Doshi with a revolver. After the shot was fired, the three persons left the cabin. Balwant Doshi noticed that he was started bleeding from right side of his chest. Meanwhile, one of the accused persons asked P.W.2 Santosh Chandanshive who was working as a Peon in the office of Balwant Doshi, where the switch of the closed circuit T.V. Camera was. P.W.2 Santosh being new could not reply. On account of this, he was slapped by the accused persons. Thereafter, the accused persons took Santosh inside the cabin of Balwant Doshi. After some time all accused persons came out of the cabin of Balwant Doshi. P.W.1 Tushar, P.W.2 Santosh and other two staff members of Balwant Doshi took P.W.4 Balwant Doshi to the hospital. They tried to establish from Balwant Doshi as to what exactly happened. At that time, Balwant Doshi uttered the name of Mahesh Makwana before these witnesses. After he regained consciousness, his statement came to be recorded. In the meanwhile, complaint came to be filed. Investigation commenced, after completion of investigation charge sheet came to be filed.

3. In due course the case was committed to the Court of Sessions. Charge came to be framed against the appellant and other accused under Sections 3(2) of the M.C.O.C. Act, r.w. 120-B of IPC and under Section 397 r.w. 3(1) (i) of M.C.O.C. Act r.w. 120-B in the alternate offence punishable under Section 144 r.w. 149, 448 and 307 of I.P.C., under Section 307 of I.P.C., under Section 3 r.w. 25(1-B) (a) and Section 35 of Arms Act, Under Section 37(1) (a) r.w. 135 of Bombay Police Act r.w. 149 of the IPC. All the accused pleaded not guilty to the said charge and claimed to be tried. The defence of the accused is that of false implication and total denial. After going through the evidence adduced by the prosecution, the learned Special Judge acquitted other accused of all offences charged and convicted and sentenced the appellant as stated in para 2 above. Hence, this appeal.

4. I have heard Ms. Anjali Patil, the learned advocate for the appellant and Mr. D.P. Adsule, the learned A.P.P. for the State. I have perused the judgment and order passed by the learned Sessions Judge as well as the record pertaining to the present case. After carefully considering the matter, I am of the opinion that the learned Judge has rightly convicted and sentenced the appellant.

5. The conviction of the appellant is mainly founded on the evidence of P.W.4 Balwant Doshi. As the prosecution story in para 2 above has taken been from the examination in chief of Balwant Doshi, I do not intend to reiterate the same here as it would only overburden this judgment. Briefly stated, the evidence of Balwant Doshi shows that on 6/7 occasion prior to the incident one Mahesh Makwana telephoned him. The said Mahesh Makwana threatened him and asked that Rs.5.00 lakhs be given by Balwant Doshi to him otherwise he would stop the construction. The evidence of Balwant Doshi further shows that on the day of the incident, five persons came to his cabin, one of them introduced himself as Mahesh Makwana and the said Mahesh Makwana made a demand of Rs.5.00 lakhs. On Balwant Doshi refusing to give the amount, the said Mahesh Makwana fired a shot at Balwant Doshi with revolver. Due to this Balwant Doshi received bleeding injury on his chest and he was hospitalised for about 16 to 17 days. Balwant Doshi has identified the present appellant as Mahesh Makwana in the parade as well as before the Court. Nothing has been elicited in the cross examination of this witness so as to disbelieve the testimony of Balwant Doshi. The evidence of this witness is corroborated to some extent by P.W.1 Tushar Shah and P.W.2 Santosh Chandanshive. Both these witnesses were present in

the office of Balwant Doshi at the relevant time. Though these witnesses were not present in the cabin when the actual incident took place, they were in the office at the time of the incident and thus they had an opportunity to observe the accused.

6. P.W.6 Dr. Rajesh Turekar examined Balwant Doshi. On examination he found 2 X 1 cm. entry wound on the right side of the chest 3 cm. from his sternum on the third intercostal space. It was pleura deep with evidence of air bubbles present which indicates breach of pleura. There was fracture of left proximal index phalanx, compound, Grade-I. Dr. Turekar has stated that the patient was admitted in the emergency ward and life saving measures were immediately taken.

7. P.W. 12 Dr. Arun Mehta operated on Balwant Doshi. On examination of patient he found following injuries on the person of Balwant Doshi.

i) Bullet wound in right hemithorax.

ii) Significant lung contusions with active haemoptysis.

iii) Large organized clot in right chest.

iv) Subscapular liver haematoma.

v) Injury to right hand.

vi) Fracture rib and soft tissue haematoma noted on right hamithorax on lateral and posterior aspect.

. Dr. Arun Mehta has stated that the injury sustained by the patient was life threatening. The patient had damage to vital organs like lung and liver. From the evidence of these Doctors it is seen that the case of the complainant is corroborated by the medical evidence.

8. The learned advocate for the appellant has submitted that the appellant was not known to P.W.4 Balwant Doshi prior to the incident. Balwant Doshi saw the appellant for the first time on the day of the incident. She has submitted that there are various lacunae in holding the T.I. parade and due to this identification of the appellant in the said T.I. parade cannot be relied upon. Ms. Anjali Patil submitted that the parade was held in an open space and that the dummies were dissimilar to the accused. She has further submitted that no questions were put to the witnesses before holding of T.I. parade in respect of their having seen the accused

earlier. She has further submitted that there was scar on the forehead of the appellant and there is no material to show that the other dummies were similar or that the scar was covered.

9. Mr. Adsule, the learned A.P.P. has submitted that in the facts of the present case, even assuming that there were lacunae in holding T.I. parade, it would not affect the identification of the appellant before the Court. He has submitted that in the facts and circumstances of this case holding of T.I. parade was not necessary. Mr. Adsule further submitted that the appellant was in the cabin of Balwant Doshi for sufficiently long period of time. Moreover, as soon as the appellant came into the cabin he introduced himself as Mahesh Makwana. Mr. Adsule has pointed out that earlier prior to this incident one Mahesh Makwana had been calling the complainant on telephone, threatening him and demanding Rs.5.00 lakhs. Mr. Adsule, submitted that thus Balwant Doshi was aware of a person named Mahesh Makwana and on the day of the incident when one person came into his cabin and introduced himself as Mahesh Makwana, Balwant Doshi immediately recollected that he is the same person who had been making telephone calls to him. The incident has happened in the day time in the office of Balwant Doshi where Balwant Doshi had sufficient opportunity to look at

the person who introduced himself as Mahesh Makwana and who later fired on Balwant Doshi. Moreover, the evidence of Balwant Doshi derives support from the evidence of P.W.1 Tushar and P.W.2 Santosh. Both these witnesses have stated that when Balwant Doshi was being removed to hospital, he twice uttered the word "Mahesh Makwana" i.e. the name of the present appellant.

10. It needs to be emphasised that there is no proposition of law or of practice having universal application to all cases that it is imperative to hold test identification of an accused person who is not known to the witnesses prior to the identification and the absence to do so would vitiate the evidence of identification of the accused person by the witnesses, for the first time in the Court.

. In this connection, it will be useful to refer to some of the observations made by the Supreme Court in in the case of **Ashfaq Vs. State reported in (2004) 3 Supreme Court Cases 116.** In the said case it has been observed that:

> "Though as a matter of general principle, the point urged with reference to the omission to conduct earlier the test identification parade may be correct, the question as to

> whether there is any violation of the same in a given case would very much depend on the facts and circumstances of each case and there cannot be any abstract general formula for universal and ready application in all cases."

In the above case it is further stated that in the case of Ramanbhai Naranbhai Patel it is observed as under:

> " Two eyewitnesses in the said case were assaulted and seriously injured in broad daylight, they could have easily seen the faces of the assailants and their appearance and identity would well remain imprinted in their minds and the third witness who was said to have seen the fatal assault on her husband could also be easily considered to have got imprinted in her mind the faces of the accused and that, therefore, the omission to hold the test identification parade did not affect the credibility or truthfulness of their evidence."

Thus, in such circumstances, it was observed in the case of Ashfaq that the accused were present in the house for quite some time holding the witnesses at

ransom by directing and issuing threat to relieve them of the valuables on which they could lay their hands and it is too much to claim, in spite of all this, that the evidence of PWs. 2, 3 and 10 could not be either sufficient to properly identify the accused or relied upon against the accused in the absence of proper test identification parade. Thus, it is clear that it is not necessary in every case to hold a parade. In the present case even if the evidence relating to parade is excluded from consideration from the facts of the case it is clear that P.W.4 Balwant Doshi had sufficient opportunity to observe the accused and hence there was no necessity of holding a parade.

11. Lastly it was submitted by Ms. Anjali Patil that the other accused were also similarly situated and those accused persons have been acquitted as their identification in the parade was not relied upon. Ms. Patil has submitted that the identification of the present appellant was also not relied upon by the learned Sessions Judge, hence, the present appellant also ought to have been acquitted by the Sessions Judge.

12. Looking to the evidence on record, it cannot be said that the case of the present appellant and that of the other accused is similar. The present

appellant had talks on more than seven occasions with Balwant Doshi prior to the incident. On 21.11.2001 when the appellant alongwith other accused entered into the cabin of Balwant Doshi, he introduced himself as ‘Mahesh Makwana’. The person who had talks with Balwant Doshi on seven prior occasions had also introduced himself as Mahesh Makwana, in such case Balwant Doshi was already aware that there was one person by name Mahesh Makwana and the said person was threatening him on telephone and making demand of Rs.5.00 lakhs. As the complainant was already aware that there was a person named Mahesh Makwana, on the appellant introducing himself as ‘Mahesh Makwana’, the identity of the appellant would be immediately fixed in the mind of Balwant Doshi. Moreover, the appellant is the only person who fired at Balwant Doshi. Looking to all these facts the identity of the appellant is bound to be imprinted in the mind of Balwant Doshi. In this view of the matter, the case of the appellant cannot be equated with that of the other accused.

13. Thus, in view of the above, I do not find much merit in the contention that there were lacunae in holding parade, hence, the identification of the accused cannot be relied upon and hence, the appellant deserves to be acquitted. In view of the evidence on record no fault can be found with the

judgment and order convicting the appellant.

14. At this stage, the learned advocate for the appellant has submitted that the sentence imposed on the appellant may be reduced to the period undergone by him. On the other hand the learned A.P.P. has submitted that the appellant was involved in other cases. He has pointed out the evidence of P.W.13 Mr. Bade. P.W.13 A.C.P. Mr. Bade attached to Airport Security, has stated that he was the investigating officer in C.R. No. 237 of 1998 of Oshivara police station. The said case is under section 302 and 207 of I.P.C. In the said case one of the accused was the present appellant. I do not find it necessary to take into account the involvement of the appellant in the said case as in the present case I find that there is sufficient material on record to establish the involvement of the appellant. In this case the offence is of serious nature. It is an attempt to commit extortion of large sum of money from businessman and builder. The appellant had earlier telephoned Balwant Doshi repeatedly and threatened him and told Balwant Doshi to give him Rs.5.00 lakhs. On refusal by Balwant Doshi, the appellant alongwith others entered into the cabin of Balwant Doshi and again demanded Rs.5.00 lakhs. On Balwant Doshi refusing to give money, the appellant fired bullet from his revolver on the chest of Balwant Doshi. Due

to the said bullet extensive injury was caused to Balwant Doshi. Looking to all these facts, I do not find that any case is made out for reduction of sentence.

15. Criminal appeal is dismissed.

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